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IN THE

Supreme Court of the United States

DON STENBERG, et al.,

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE AND THE THOMAS MORE CENTER FOR LAW & JUSTICE AS AMICI SUPPORTING PETITIONERS

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*. This brief is filed with consent of the parties–letters indicating that consent are being filed with the brief.

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Statement of Interest of Amici*

The American Center for Law & Justice

The American Center for Law and Justice ("ACLJ") is a national, non-profit, public interest law firm. The ACLJ is devoted to safeguarding the sanctity of human life. The ACLJ accomplishes that goal through education, litigation, legislative assistance, and related activities.

ACLJ attorneys have advocated in defense of human life in state and federal courts and have appeared in numerous cases before this Court. The ACLJ's Chief Counsel has argued several cases before this Court, including *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), *Schenck v. Pro-Choice Network of Western New York, Inc.*, 519 U.S. 357 (1997), and *Hill v. State of Colorado*,

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* No counsel of a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

No. 98-1856 (argued Jan. 19, 2000).[1]

The ACLJ files this brief in support of the Petitioners. The ACLJ seeks to bring to this Court's attention its view that the decision below represents a transformation of the abortion liberty announced in *Roe v. Wade*, 410 U.S. 113 (1973), and substantially reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Neither *Roe* nor *Casey* recognized a liberty interest in, or a constitutional right to, the death of an unwanted or unplanned child. Moreover, the ACLJ seeks to bring to this Court's attention its view that this Court's "abortion jurisprudence," which the Court has most recently defended as a thing deemed socially necessary rather than necessarily legally correct, *Casey*, 505 U.S. at 854-69

1. In addition, ACLJ attorneys have filed briefs for amici curiae or parties in numerous other matters in this Court, including *Mitchell v. Helms*, No. 98-1648 (argued Dec. 1, 1999); *Board of Regents of University of Wisconsin System v. Southworth*, No. 98-1189 (argued Nov. 9, 1999); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996); *Romer v. Evans*, 517 U.S. 620 (1996); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994); *National Organization for Women v. Scheidler*, 510 U.S. 249 (1994); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Lee v. Weisman*, 505 U.S. 577 (1992).

(relying on *stare decisis* as justification for sustaining "central holding" of *Roe*), has not, to this point, addressed whether the deliberate and willful violence that marks the practice defended by abortionist Leroy Carhart even constitutes an "abortion" as this Court has used that term.

The Thomas More Center for Law & Justice

The Thomas More Center for Law & Justice is a national, not-for-profit, public interest law firm based in Ann Arbor, Michigan. The Thomas More Center is dedicated to educating and defending the citizens of the United States with respect to their constitutional rights and liberties, particularly, in defending the sanctity of human life. The Thomas More Center accomplishes these goals through education, litigation, legislative assistance, and related activities.

Summary of Argument

In the present case, Leroy Carhart, an abortionist who commits "partial birth" abortions, brought a facial challenge to a Nebraska statute banning such abortions. Nebraska has defended its statute under this Court's precedents. In error, the court below concluded that Nebraska's statute is facially unconstitutional. In doing so, the court expressed the view that this Court had changed the standard normally applicable to facial challenges – the "no set of circumstances" test, *see United States v. Salerno*, 481 U.S. 739, 745 (1987) ("[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). Consequently, the court below applied

the so-called "large fraction" test employed by the joint opinion in *Casey*, 505 U.S. at 895 ("[t]he unfortunate yet persisting conditions we document above will mean that in a large fraction of the cases in which § 3209 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion").

The decision below is due to be reversed. The court below erred both by applying the "large fraction" test *instead* of the "no set of circumstances" test and by concluding that the Nebraska statute failed the "large fraction" test. First, nothing in *Casey* directs the courts to disregard *Salerno* and the test it identifies for facial challenges. In two prior decisions, this Court applied *Salerno* to determine whether facial challenges to abortion regulations were facially constitutional. *See Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502 (1990). Second, under a proper reading of Nebraska's statute – the reading given to the statute by its law enforcement officials – Nebraska's statute passes the "large fraction" test.

The judgment below is due to be reversed even without reaching the question of whether this Court should overrule *Roe v. Wade*. In the view of these amici, however, no argument in defense of state restrictions on abortion can be soundly made if it omits the fundamental principle: this Court erred in *Roe*, when it held that babies still inside their mothers' wombs are not "persons" with rights under the Constitution. The Court compounded that error with the conclusion that the right of a mother to abort her pregnancy was guaranteed by the Fourteenth Amendment. This Court should candidly admit the errors it committed in peeling away from children before birth

the protective mantle of rights afforded to others by the United States Constitution. This Court should overrule *Roe*.

ARGUMENT

I. THE NEBRASKA "PARTIAL-BIRTH" ABORTION STATUTE PROHIBITS ONLY THE SO-CALLED INTACT D & X PROCEDURE TO CAUSE THE DEATH OF A CHILD DURING THE PROCESS OF DELIVERY, A TECHNIQUE THAT FINDS NO COVER IN EITHER *ROE* OR *CASEY*

A. The Nebraska Statute

The Nebraska statute, as construed by the law enforcement officers of that State, restricts only the so-called Intact Dilation and Extraction ("D & X") procedure. That procedure, which consists of an induced partial delivery of the child, would not even be considered by the *Roe* Court to constitute an abortion. *See* Brief Amici Curiae of Louisiana, *et al.* (citing transcript of reargument in *Roe*). Instead, such a procedure is a form of parturitional infanticide that was not legitimized by *Roe*.

Nebraska's Legislative Bill 23 (hereafter "LB 23"), a bill enacted by the Nebraska Legislature prohibiting "partial-birth abortion" was signed into law in 1997. LB 23 provides:

> No partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from

the pregnancy itself.

Neb.Rev.Stat. § 28-328(1) (1998). The term "partial-birth abortion" is defined as:

> an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.

Neb.Rev.Stat. § 28-326(9) (1998). Commission of a prohibited "partial-birth abortion" constitutes a Class III felony. See Neb.Rev.Stat. § 28-328(2) (1998). An abortionist who intentionally and knowingly performs an unlawful "partial-birth abortion" will automatically have his license to practice medicine in Nebraska suspended and revoked. See Neb.Rev.Stat. § 28-328(4) (1998).

B. Neither *Roe* Nor *Casey* Recognize a Right of a Mother to Insist That Her Unborn Child Be Substantially Delivered out of Her Uterus and Then Killed by the Evacuation of the Contents of the Child's Skull.

The court below breezily concluded that *Roe* and *Casey* mandate the result it reached. That conclusion ascribes to the

majorities in those cases a quite specific intent about the meaning of the right to an abortion in later pregnancy. Nothing in those decisions, however, lends support to the court below.

By statute, the Nebraska Legislature has prohibited one particularly gruesome form of near birth infanticide. The abortion right announced in *Roe v. Wade*, and retained as a liberty interest in *Casey*, however, has little to do with the present facial challenge to a statutory ban on D & X infanticide. In *Roe*, this Court held that the Texas anti-abortion statutes at issue were unconstitutional. 410 U.S. at 164-66. The *Roe* Court also noted that another Texas statute that bans killing a child in the process of being born was unchallenged and unaffected. 410 U.S. at 117 n.1.[2] Nothing in the joint opinion in *Casey* or in any of the concurrences lends no support to Respondent's challenge because nothing in that decision expanded the abortion liberty to include destruction of a partially born child.

Popular nomenclature aside, D & X procedures are not true abortions. When the physician delivers the lethal blow in a partial birth abortion, the child "is merely inches from being delivered and obtaining full legal rights of personhood under the U.S. Constitution." *Planned Parenthood of Wisconsin v.*

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2. The Texas statute read: "[W]hoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years." Texas Penal Code Art. 1195 (1973). "Parturition" is the action or process of giving birth to offspring. WEBSTER'S COLLEGIATE DICTIONARY 848 (10th ed. 1995).

Doyle, 44 F. Supp. 2d 975, 982 (W.D. Wis. 1999) (citations omitted), *aff'd in part on other grounds, rev'd in part on other ground, sub nom., Hope Clinic v. Ryan*, 193 F.3d 857 (7th Cir. 1999) (en banc) (upholding Illinois and Wisconsin partial birth abortion bans). Such a procedure, amidst parturition, is "closer to infanticide than it is to abortion." 44 F. Supp. at 982. The abortion liberty does not include an independent right to assure fetal death. Nor does the abortion liberty justify killing a child as he proceeds out of his mother's body.

The Eighth Circuit asserted two fundamentally flawed reasons for rejecting Nebraska's argument that its statute does not implicate the abortion liberty. *See* Pet. App. at 16-18. First, the trial court had concluded that LB 23 violated the abortion liberty as an undue burden on it because the statute restricted not only the intact D & X abortion technique, but also the Dilatation and Extraction (hereafter, "D & E") technique. Pet. App. at 16. Nebraska countered that the statute only applied to the D & X technique. The Eighth Circuit affirmed the trial court's decision to ignore Nebraska's construction of its statute and considered abortionist Carhart's challenge to the statute as one challenging a restriction on *both* intact D & X infanticide and D & E abortions. Pet. App. at 18.

Second, the Eighth Circuit appears to take the mistaken position that *Roe* and *Casey* foreclose Nebraska's arguments. The court below specifically eschewed decision of the question whether "there is a separate legal category for the "partially born," Pet. App. at 20. Although the court below paled in the face of that question, it affirmed the judgment that the statute was facially unconstitutional; in doing so, it effectively precluded that category of human beings from holding any legal

significance.

The distinction drawn by the joint opinion in *Casey* between viable and non-viable fetuses has relevance — so long as the context is "abortion." That distinction does not define the boundaries of what constitutes "abortion" for purposes of constitutional law. Whether "abortion" is so expansive a concept that it includes death to a child being born is a point that *Casey* — like *Roe* — did not reach.

The destruction of a living human child in utero with the mother's consent is an abortion. Until this Court corrects its own error, or the Constitution is amended to correct that error, or the turmoil exacerbated by this Court's intrusion into the issue makes continued abortion on demand untenable, state regulation of such conduct must be judged by existing abortion jurisprudence. Presumably, abortionist Carhart would agree that it is homicide of an infant if a child is killed after being fully born and that such an act is not an abortion. That conclusion even obtains where the nonviability of the newly born child would impair the child's ability to survive.

When a child is between the womb and the outside world and in transition, he has an "in between" status that this Court has not addressed. Under our federal system, the lack of any precedent one way or the other is an argument in support of Nebraska's authority, not against it. Nebraska's authority to adopt the challenged statute is plenary.

II. RESPONDENT'S FACIAL CHALLENGE TO NEBRASKA'S STATUTORY BAN ON ONE FORM OF PERINATAL INFANTICIDE IS SUBJECT TO, AND FAILS, THE SALERNO STANDARD.

The Eighth Circuit erroneously concluded that the Respondent succeeded in his facial challenge. Its error, in the first instance, resulted from its choice of the wrong standard by which to judge a facial challenge to the constitutionality of the Act. It should have used the "no set of circumstances" test from *Salerno*, 481 U.S. at 745. Instead, it erroneously construed *Casey* to have displaced the *Salerno* standard with a new "large fraction" test, *see Casey*, 505 U.S. at 895. Nebraska prevails under either test; because application of *Salerno* leads to that victory directly, it warrants careful consideration.

In ordinary litigation, a party who brings a facial challenge against a statute faces the Herculean task. To succeed, such a challenger must demonstrate that there is "no set of circumstances" in which the statute operates constitutionally. *Salerno*, 481 U.S. at 745. The exception to that general rule is found in the discrete category of facial challenges that assert that a statute trenches unconstitutionally on rights guaranteed by the Free Speech Clause of the First Amendment. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992) (citing additional cases).

In *Salerno*, this Court said that, in a "facial challenge" to a statute, "the challenger must establish that no set of circumstances exist under which the Act would be valid." 481 U.S. at 745. After deciding *Salerno*, this Court followed the rule explained in *Salerno* in two subsequent facial challenges

to abortion laws, *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (citing *Salerno*); *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 514 (1990) (citing *Salerno* and O'Connor concurrence in *Webster*).

In *Webster*, this Court considered facial challenges to several statutory restrictions imposed by Missouri on the use of its own public resources. By statute, Missouri restricted the use of public employees and facilities for the performance or assistance of elective abortions. 492 U.S. at 507-12. In *Webster*, this Court concluded that such restrictions do not contravene its abortion decisions. *Id.* That conclusion arose from the rudimentary principle that the Due Process Clauses do not grant any affirmative right to governmental assistance, even where such assistance is needed to secure life, liberty, or property interests of which the government may not deprive the individual. *See DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989).

The *Webster* plurality noted that, in a series of cases – *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); *Harris v. McRae*, 448 U.S. 297 (1980) – this Court affirmed the constitutionality of regulations denying public funds for elective abortions while, at the same time, allowing payments for medical services related to childbirth; that line of cases embodied this Court's recognition that a government's decision to favor childbirth over abortion through its particular allocation of public resources does not violate *Roe*. From that line of cases, the *Webster* plurality reasoned that a State could implement that value judgment by its allocation of other public resources, such as hospitals and medical staff. Just as in

Maher, *Poelker*, and *Harris*, this Court concluded in *Webster* that Missouri's decision to use public facilities and employees to encourage childbirth over abortion did not place any governmental obstacle between a woman who chooses to abort her unborn child.

Justice O'Connor concurred in part and concurred in the judgment in *Webster*. 492 U.S. at 522. In that concurrence, Justice O'Connor concluded that the challenges to the statutory restrictions on the use of state employees and facilities must fail because "some quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enought to defeat" the facial challenge. That conclusion is the narrowest ground of concurrence stated by the judges whose votes decided *Webster*. Following this Court's teaching that, in cases where no opinion commands a majority, the concurrence stating the narrowest ground of decision represents the holding of the Court,[3] it is reasonable to conclude that Justice O'Connor's opinion – which applied *Salerno* to dismiss the facial challenges – was the *Webster* Court's holding in that respect.

Any lingering uncertainty, however, about the foregoing conclusion was resolved in *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502 (1990). There, the Court considered an

3. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted).

Ohio statute limiting access to abortion by requiring that notice be given to the parents of an unmarried, unemancipated, minor woman unless a court order approving the abortion was obtained. *Id.* at 506. In its decision, the Court specifically relied on *Salerno* and invoked Justice O'Connor's concurrence in turning away a facial challenge to the statute. *Id.* at 414.

The Eighth Circuit erred in treating *Casey*'s "large fraction" as displacing *Salerno*'s "no set of circumstances" test.[4] A

4. The courts of appeals are divided on whether *Casey* displaced *Salerno* in abortion jurisprudence with a more lenient "large fraction" standard. Four circuits — the Sixth, Eighth, Ninth and Tenth — read *Casey* to have abandoned *Salerno*. *See Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 193-96 (6th Cir. 1997); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995); *Planned Parenthood of Southern Ariz v. Lawall*, 180 F.3d 1022 (9th Cir. 1999); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996). The Fifth Circuit disagrees and adheres to *Salerno*. *See Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992). Accord *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1103-04 (5th Cir. 1997) (noting the practice of the Fifth Circuit to await decisions of this Court actually effecting a change in law, rather than prognosticating about future changes in law based on dicta in opinions dissenting from, or concurring in, the denial of certiorari). The Fourth Circuit has not decided a case in which choice between *Salerno* and *Casey* was required, but has stated, in dicta, its intention to apply the *Salerno* standard until this Court specifically directs otherwise:

> It is not the province of the court of appeals to predict how the Supreme Court will ultimately rule on an issue. *Casey* does not specifically overrule *Salerno*. At the moment, the most that can be said is that three Justices have indicated a desire to do so. Until the Supreme Court specifically does so, though, this Court

(continued...)

careful reading of *Casey* shows it does not displace *Salerno*. At issue in *Casey* was a Pennsylvania law requiring a woman to notify her husband before having an abortion. Recognizing that most married women would notify their husbands without being legally required to do so and that the law contained various exceptions, Pennsylvania argued that the notification requirement "impose[d] almost no burden at all for the vast majority of women seeking abortions" and that "the effects of [the requirement] are felt by only one percent of the women who obtain abortions." 505 U.S. at 894. Rejecting this argument, the *Casey* plurality said "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* A law, it said, must be "judged by reference to those for whom it is an actual ... restriction." *Id.* at 895. While this approach is different from the one urged by Pennsylvania, it does not

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4. (...continued)
is bound to apply the *Salerno* standard as it has been repeatedly applied in the context of other abortion regulations reviewed by the Supreme Court.

Manning v. Hunt, 119 F.3d 254, 268 n.4.

While three Justices of this Court have expressed their desire to overrule *Salerno*, three other Justices have expressed their support for the *Salerno* standard. *See Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175-76 (1996) (Stevens, J. concurring in denial of certiorari); *Fargo Women's Health Organization v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J., and Souter, J., concurring in denial of stay pending appeal). *But see Janklow*, 517 U.S. at 1176-81 (1996) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of certiorari).

mandate the use of a "large fraction" test. Instead, at most, it means that the joint opinion offered a refinement of what counts as a "circumstance" when considering whether it has been shown that a statute is constitutional in "no set of circumstances."

The conclusion that *Salerno* still governs is strengthened by reviewing the concerns at work in *Casey*. Although the joint opinion expressed concern over the risk of spousal abuse, 505 U.S. at 888-893, a more basic concern was expressed. Specifically, the joint opinion reasoned that to subject any woman to a spousal notification requirement would invade her liberty in a way that equated her with a child. *Id.* at 898. Thus, whenever the requirement operates as a restriction (i.e., when a woman notifies her husband only because the law forces her), it is unconstitutional. If there are no circumstances where a law is constitutional, then it is invalid under *Salerno*.[5] No new standard was needed by the joint opinion in *Casey*. The hint of one at all is too faint and uncertain to be the basis for disregarding this Court's direct holding in *Salerno*, *Webster* and *Akron*.

With *Salerno* as the standard, Nebraska readily prevails. There are applications of the Act that Respondent cannot show are unconstitutional (e.g., as applied to post-viability elective

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5. While the dissenting Justices relied on the *Salerno* standard, their real point of disagreement was whether it is constitutional to require a woman to notify her husband of her abortion decision when no issue of potential abuse or other special circumstance is implicated. *Id.* at 974-76 (Rehnquist, C. J., dissenting).

D&X abortions not done to preserve maternal life or health, or when there is clearly no demonstrable differential health benefit in performing such an abortion). The inquiry need go no further.

III. NEBRASKA'S BAN ON "PARTIAL-BIRTH" ABORTION IS FACIALLY CONSTITUTIONAL UNDER A "LARGE FRACTION" TEST.

Even if the "large fraction" test was the right one to use, the Eighth Circuit failed to apply that test properly. The impropriety resulted from the court's failure to properly construe Nebraska's statute. When that test is applied to the Act as properly construed, it is plain that the Respondent has failed to carry his burden, and that the Act is constitutional.

At the outset, it is necessary to consider what the joint opinion meant by a "large fraction." Initially such an exercise seems to require the construction of a fractional number.[6] Following the construction of the fraction, a separate determination of whether the fraction is "large" is required. To construct a fraction, one must identify its numerator and denominator. According to *Casey*, the numerator consists of the women for whom the Act "operate[s] as a substantial obstacle to [the] woman's choice to undergo an abortion." 505 U.S. at 895. The denominator is the number of women for

6. The term "fraction" has been defined as "[o]ne or more aliquot parts of a unit or integer; the indicated quotient of one integer divided by another." WEBSTER'S NEW INTERNATIONAL DICTIONARY (2nd ed. unabridged) 1000.

whom the Act is "an actual rather than an irrelevant restriction." *Id.* This latter group is composed of women who would elect a partial birth abortion if Nebraska did not prohibit that procedure.

The Eighth Circuit makes no effort to quantify the two parts of the fraction under the reading of Nebraska's statute advanced by its law enforcement officials. Moreover, there is no evidence that would permit the conclusion that the resulting fraction is "large".[7] The absence of any such evidence means that the Respondent did not meet his burden.

Moreover, the evidence in this case affirmatively shows that the fraction is not large, but extremely small. First, as for the numerator, there are "no circumstances" in which a partial birth abortion is "the only option to save the life or preserve the health of the woman." 143 Cong. Rec. S4708 (daily ed. May 20, 1997) (statement of the American College of Obstetrics and Gynecology (hereafter "ACOG")) ("[a] select panel convened by ACOG could identify no circumstances under which this

7. *Casey* omits to identify the size at which a fraction becomes a "large fraction;" this omission supports the view that the Court did not supplant *Salerno*'s "no set of circumstances" test with the *Casey* Joint Opinion's "large fraction" test. What constitutes a "large fraction," absent further explanation, would be a quite subjective consideration. Perhaps nine out of ten (ninety percent) would qualify. Or, perhaps, judges serving in the lower federal courts will rely on considerations quite apart from *federalism* and *separation of powers* (the principles that underlie the "no set of circumstances" test) to make such a determination. But whatever the right dividing line might be, Respondent was not required to show that Nebraska's statutes crossed into that forbidden zone.

procedure, as defined above, would be the only option to save the life or preserve the health of the woman"). Thus, there is no circumstance in which the Act operates as a "substantial obstacle" to a woman's choice to undergo "an abortion." The numerator still is zero. Even indulging in speculation that there may be some hypothetical situation that never occurred to the select panel on which ACOG relied, the numerator must be very, very small.

As for the denominator, it may be supplied by facts that can be gleaned from experience in areas where physicians have offered D & X abortions.[8] The legislative history of the bill passed by the United States House of Representatives shows that, in New Jersey, "at least 1,500 partial-birth abortions are performed each year." H.R. Rep. No. 105-24, at 13 (hereafter "the Report") (citation omitted). Most are elective. Few, a "minuscule amount," are performed for medical reasons.[9] *Id.* The Report concludes that this information "refute[s] the

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8. The "large fraction" test also suffers from an additional defect. It is difficult to quantify empirically the number of women who would choose a partial birth abortion were it not for the Nebraska statute. This difficulty is real; what evidence will be offered in support of the claim? To the extent the problem cannot be solved by the evidence, it is those who challenge the statute who must lose since it is they who bear the burden of proof.

9. This reference to medically indicated cases refers to those cases where the underlying abortion decision was made for medical reasons and does not suggest that the decision to use the partial birth technique was ever medically indicated. Moreover, assuming *arguendo* that every medically indicated case was one where both the abortion and the partial birth procedure were medically necessary, a "miniscule" number is not a "large fraction" of the total partial birth abortions performed.

abortion advocates claims that partial-birth abortion was both rare and only performed in extreme medical circumstances." H.R. Rep. 105-24 at 13.

While Nebraska is smaller than New Jersey, the experience of that State is nevertheless relevant here. Given this denominator, and regardless of whether the numerator is zero or just very, very small, the resulting fraction falls far short of being "large" by any definition of the term. Thus, even under the "large fraction" test, the Nebraska Act passes constitutional muster.

IV. LIKE THEIR PREDECESSORS, *DRED SCOTT* AND *PLESSY*, *ROE* AND *CASEY* ARE FUNDAMENTALLY WRONG AND SHOULD BE REVERSED.

In 1857, this Court faced and failed a historic "teaching moment." Then, in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), this Court concluded that, although he might be the citizen of *a State* by operation of the law of that State, an African in America was not, and could not be, a citizen of the *United States*. *Id.* at 406. Per force of that conclusion, Scott's federal suit was dismissed for lack of jurisdiction. Over a decade passed before the plain error and political illegitimacy of the *Dred Scott* decision was confirmed by the ratification of the Fourteenth Amendment to the United States Constitution. In the intervening period, the Chief Executive portended that the ongoing, bloody, civil war might

> continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall

> be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said 'the judgments of the Lord are true and righteous altogether.'

A. Lincoln, Second Inaugural Address (Mar. 4, 1865) (quoting Psalm 19:9 (King James)), *reprinted in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES FROM GEORGE WASHINGTON 1789 TO GEORGE BUSH 1989, S. Doc. 101-10, p. 143 (1989).

In 1992, in *Casey*, this Court faced and failed yet another a historic teaching moment when it did not overrule *Roe v. Wade*. Except, perhaps, for *Dred Scott*, *Roe v. Wade* embodies the most startling judicial abrogation of civil rights ever wreaked by the Court. In *Roe*, this Court struck down Texas abortion statutes as a result of its apparent conclusion that prior to birth, the unborn human child is neither a citizen, nor a person, as those terms are used in the Fourteenth Amendment to the United States Constitution. Subsequent social upheaval and unrest demonstrated that, as with the *Dred Scott* decision, the Court had erred by denying basic civil and constitutional rights to an unrepresented, discrete and insular minority. *Casey* was an appropriate opportunity for this Court to undo the wrongs of *Roe*; this Court failed to correct its own earlier error.

In an effort at justification, the joint opinion in *Casey*, 505 U.S. at 861-66, asserts that *Roe* was of a kind with this Court's earlier decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). In fact, *Roe* traces its descent to *Dred Scott* through *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Dred Scott*, if it accomplished anything other guaranteeing that Mr. Scott would spend his remaining days in involuntary servitude, hardened

public opinions and helped to create the conditions under which insurrection became inevitable. It took a war that Abraham Lincoln considered a national judgment by God, and the Reconstruction Amendments, to remove the blot of that decision. *Plessy*, of a piece with *Dred Scott*, erected a hardened bunker within which color-dependent discrimination could blossom. This Court's decision in *Brown*, together with the decades-long, nonviolent, civilly disobedient opposition of African Americans was necessary to undo the segregation this Court legitimized and institutionalized in *Plessy*.

Like its predecessors, *Dred Scott* and *Plessy*, *Roe* did not resolve the social and legal controversy over the morality and legality of abortion. As this Court has elsewhere said, "[m]en and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality." *Casey*, 505 U.S. at 850.

In the present case, this Court has declined, quite specifically, to consider the *essential* question, whether *Roe* will fall at the Court's own behest. Instead, this Court has confined itself to a consideration of one State's legislative proscription of a particularly gruesome form of perinatal infanticide. The Court should take this opportunity, however, to reconsider its decision in *Roe* and its decision to sustain *Roe* in *Casey*.

CONCLUSION

For the reasons stated above and in Petitioners' brief, the judgment below should be reversed.

Respectfully submitted,

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